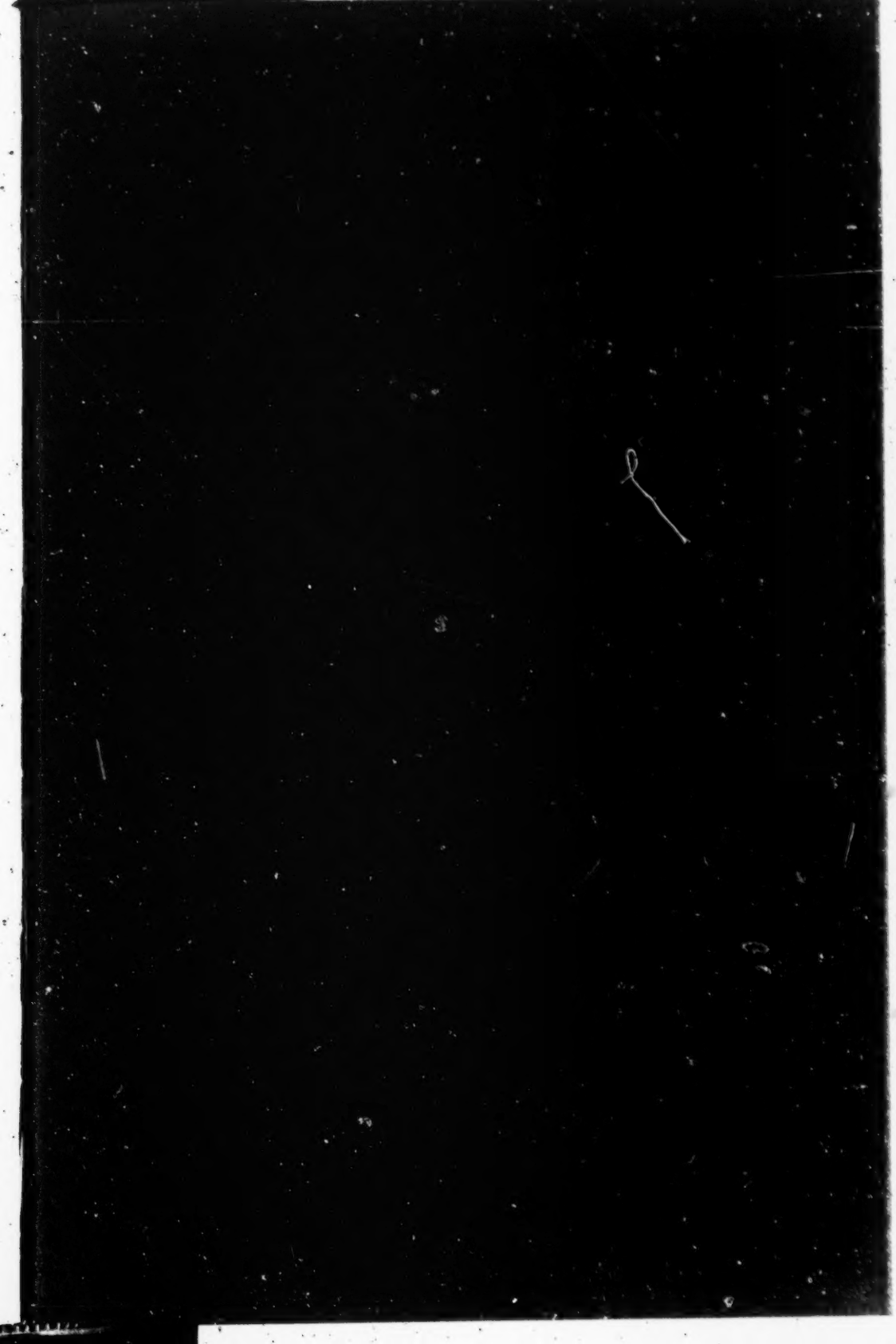

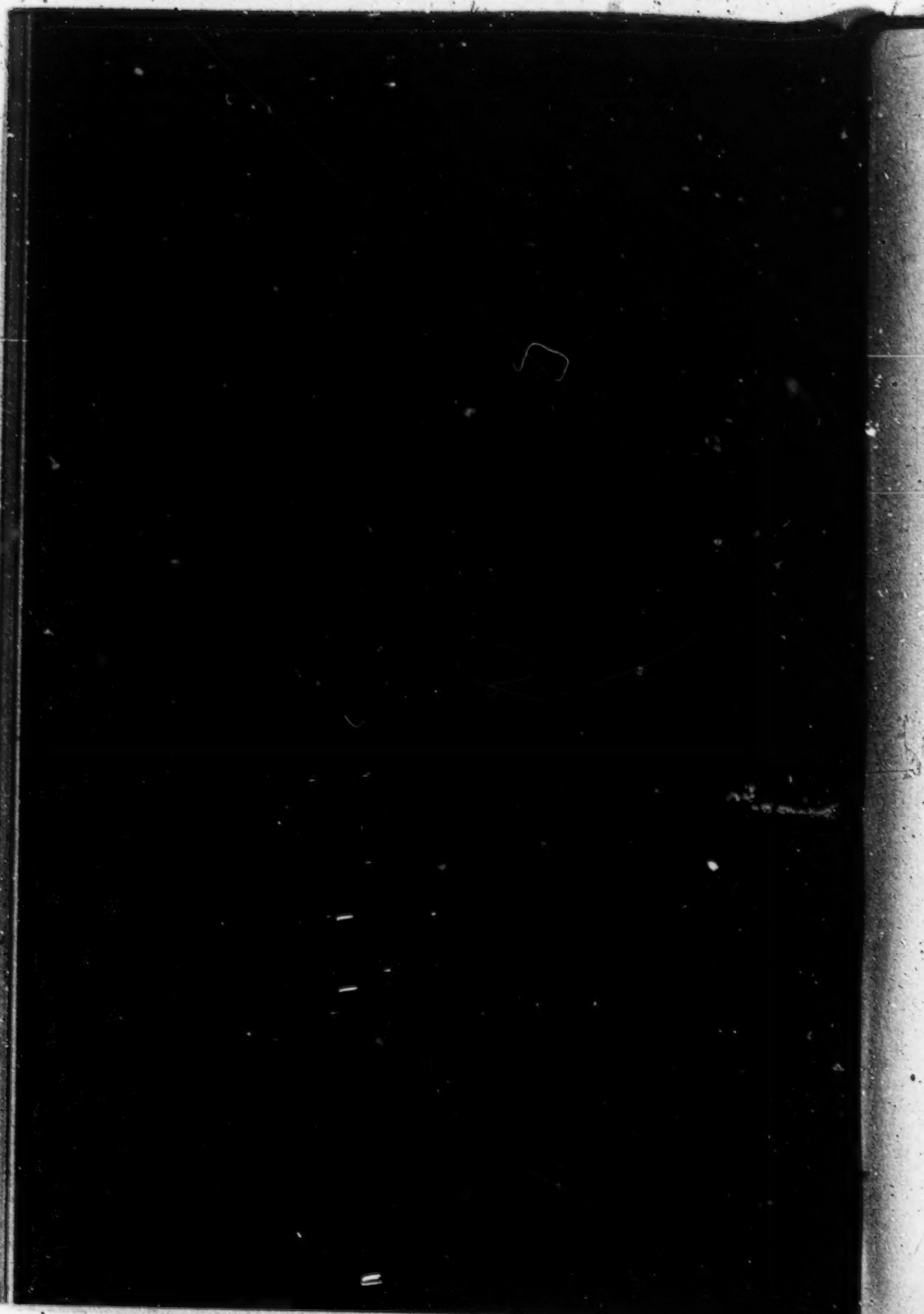

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In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 810

GEORGE W. O'MALLEY, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE, APPELLANT

v.

JOSEPH W. WOODROUGH AND ELLA B. WOODROUGH

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA

BRIEF FOR THE APPELLANT

OPINIONS BELOW

The District Court did not deliver an opinion. However, its order supplementing the order denying the motion to dismiss (R. 10) sets forth the reasons for its decision.

JURISDICTION

The judgment of the District Court was entered March 18, 1939 (R. 12–13). The petition for appeal was presented March 18, 1939 (R. 13), and allowed on March 20, 1939 (R. 15). Probable jurisdiction was noted April 3, 1939. The jurisdiction of this

Court rests upon Section 2 of the Act of August 24, 1937, c. 754, 50 Stat. 751.

QUESTION PRESENTED

Whether the provision of the Revenue Act of 1936 requiring the inclusion in gross income of the compensation of federal judges taking office after June 6, 1932, is constitutional.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Constitution of the United States:

ARTICLE III

SECTION 1. The Judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Revenue Act of 1936, c. 690, 49 Stat. 1648:

SEC. 22. GROSS INCOME.

(a) *General definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or

use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. In the case of Presidents of the United States and judges of courts of the United States taking office after June 6, 1932, the compensation received as such shall be included in gross income; and all Acts fixing the compensation of such Presidents and judges are hereby amended accordingly. (U. S. C. Supp. IV, Title 26, Sec. 22.)

STATEMENT

This suit was commenced by a petition at law to recover income taxes already paid. The Government's motion to dismiss was overruled, whereupon judgment was entered for the plaintiffs, appellees herein. The facts disclosed by the pleadings are as follows:

Appellee Joseph W. Woodrough was appointed a judge of the United States Circuit Court of Appeals for the Eighth Circuit on April 12, 1933, and took oath of office on May 1, 1933. Prior thereto, and prior to June 6, 1932, he had been a judge of the United States District Court. His salary as District Judge was $10,000 a year, and his salary as Circuit Judge, $12,500 a year.

Judge Woodrough and his wife duly filed a joint income tax return for the calendar year 1936 disclosing the $12,500 judicial compensation, but

claiming it to be constitutionally immune from taxation. By failing to include the $12,500 in gross income, no tax was payable. However, in the fall of 1937 a deficiency, based upon that item, was assessed, and appellees on December 15, 1937, paid under protest $631.60, together with interest of $28.42 from March 15, 1937, to the date of payment.

Thereafter, a claim for refund was filed which was rejected, whereupon this suit for refund was instituted.

SPECIFICATION OF ERRORS TO BE URGED

The District Court erred:

1. In denying the Government's motion to dismiss.

2. In failing to hold valid and constitutional the provisions of Section 22 (a) of the Revenue Act of 1936 (c. 690, 49 Stat. 1648), requiring the inclusion in gross income of the compensation received by Joseph W. Woodrough as judge of the United States Circuit Court of Appeals for the Eighth Circuit, since he had taken office after June 6, 1932.

3. In failing to hold valid and constitutional the provisions of Section 22 (a) of the Revenue Act of 1936 (c. 690, 49 Stat. 1648), requiring the inclusion in gross income of the compensation received by Joseph W. Woodrough as judge of the United States Circuit Court of Appeals for the Eighth Circuit, irrespective of the fact that he took office after June 6, 1932.

4. In holding that the provisions of Section 22 (a) of the Revenue Act of 1936 (c. 690, 49 Stat. 1648), requiring the inclusion in gross income of the compensation received by Joseph W. Woodrough as judge of the United States Circuit Court of Appeals for the Eighth Circuit, are repugnant to Article III, Section 1 of the Constitution, or are contrary to any other provisions of the Constitution, express or implied.

SUMMARY OF ARGUMENT

I

The tax here challenged is nondiscriminatory. It applies to all alike regardless of the source of income and is levied for the purpose of defraying the general expenses of government. It is a tax upon net income, and in no sense can it be treated as a charge against any particular receipts constituting the taxpayer's gross income.

Article III, Section 1, of the Constitution does not forbid such a tax. The provisions relied upon by appellees merely prohibit the diminution of a judge's compensation. They do not confer any tax exemption. Plainly, the tax here involved is not an outright reduction of compensation. Only by treating it as an attempt to attain the forbidden end by indirection can it be said to run afoul of the Constitution.

But the end which these provisions seek to achieve is simply the assurance of an independent

judiciary. A general nondiscriminatory tax upon net income, being merely a fair method of distributing the costs of government among those who enjoy its benefits, is no more a reduction of salary than any other item of expenditure on the taxpayer's budget, and cannot possibly be made an instrument of control.

Concededly, our position is contrary to *Evans* v. *Gore*, 253 U. S. 245, but we ask that it be reexamined and overruled. The assumption that the validity of such a tax would necessarily enable the legislature to impose a discriminatory exaction solely upon judges, thus circumventing the prohibition of Article III, Section 1, is wholly without foundation. The judiciary will be fully protected by the nondiscriminatory requirement. A hostile exaction can readily be invalidated. Cf. *Grosjean* v. *American Press Co.*, 297 U. S. 233.

The independence of the judiciary is as deeply rooted in other English-speaking countries as it is here. Yet, in England, Canada, Australia, and South Africa, judges are subject to the general income tax. Similarly, the constitutions of many of our states contain provisions prohibiting the reduction of salaries of state judges, but on the whole, those provisions have not been thought to prevent the imposition of a general state tax upon net income computed by including judicial compensation.

II

In Point I, we urged the overruling of *Evans* v. *Gore*, contending broadly that a general nondiscriminatory tax upon net income is valid as applied to the compensation of any judge. We now argue that the tax here challenged is valid upon the narrower ground that Judge Woodrough was appointed after June 6, 1932, the effective date of the Revenue Act of 1932.

Section 22 (a) of the Revenue Act of 1932 specifically required the inclusion of judicial compensation of after-appointed judges in gross income and declared that "all Acts fixing the compensation of such * * * judges are hereby amended accordingly." These provisions were carried forward into the Revenue Acts of 1934 and 1936, the latter being the statute under attack here. In the aggregate the successive revenue Acts form a continuous fabric of tax legislation, and the provisions specifically limiting judicial compensation by the amount of the income tax were in effect when Judge Woodrough took office in 1933 as Circuit Judge. At the time he was appointed, the annual salary as fixed by Congress was $12,500, minus the tax imposed by law. Thus, there has been no diminution of compensation by reason of the income tax. Nor does Judge Woodrough have any standing to urge that the revenue Acts superseding the 1932 Act have increased the amount of tax,

thereby diminishing his net receipts. For, the plain fact is that the amount of tax under the 1934 and 1936 Acts is less than under the 1932 Act where the earned income falls in brackets under $26,000.

ARGUMENT

Introductory.—Section 22 (a) of the Revenue Act of 1936, c. 690, 49 Stat. 1648, contains the following sentence:

> In the case of Presidents of the United States and judges of courts of the United States taking office after June 6, 1932, the compensation received as such shall be included in gross income; and all Acts fixing the compensation of such Presidents and judges are hereby amended accordingly.

That provision had its origin in Section 22 (a) of the Revenue Act of 1932, c. 209, 47 Stat. 169, which provided—

> In the case of Presidents of the United States and judges of courts of the United States taking office *after the date of the enactment of this Act,* the compensation received as such shall be included in gross income; and all Acts fixing the compensation of such Presidents and judges are hereby amended accordingly. [Italics supplied.]

The 1932 Act became law on June 6, 1932. And when the Revenue Act of 1934, c. 277, 48 Stat. 680, superseded the 1932 Act the italicized phrase was modified to read "after June 6, 1932" in order to preserve continuity. See *Bland* v. *Commissioner*

(C. C. A. 7th), decided February 27, 1939, not yet officially reported, but found in 1939 C. C. H., Vol. 4, par. 9337. That latter phrase was continued in Section 22 (a) of the 1936 Act, here involved, as well as in the most recent revenue law, the Revenue Act of 1938, Public, No. 554, 75th Cong., 3d Sess.

Judge Woodrough took office as Circuit Judge on May 1, 1933, and is accordingly subject to the provisions of Section 22 (a) unless they should be invalid. The principal contention of appellees is that Section 22 (a) is violative of Article III, Section 1, of the Constitution, which provides:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Two other contentions are made, one based upon the general structure of Articles I, II, and III of the Constitution creating three independent branches of Government, and the second, upon the Fifth Amendment. We believe that both these arguments are at most variations of the principal contention, and that the discussion of our position with respect to the principal point will dispose of the other two. Accordingly, we will confine this

brief to a consideration of whether the inclusion of Judge Woodrough's salary in gross income is contrary to Article III, Section 1.

Our argument consists of two major points. First, we will urge broadly that any nondiscriminatory income tax as applied to judicial compensation is not repugnant to Article III, Section 1 of the Constitution, regardless of whether the judge took office before or after the enactment of the taxing statute. Second, we will contend that, in any event, since Judge Woodrough took office after June 6, 1932, the tax with respect to his compensation is valid.

I

THE INCLUSION OF A JUDGE'S SALARY IN GROSS INCOME DOES NOT VIOLATE ARTICLE III, SECTION 1

Article III, Section 1, of the Constitution does not deal with taxes. It provides for the establishment of the federal courts and seeks to obtain an independent judiciary by according life tenure to the judges and assuring them "a Compensation, which shall not be diminished during their Continuance in Office." No tax exemption is anywhere conferred in those provisions. Yet this Court has held in *Evans* v. *Gore*, 253 U. S. 245, that a nondiscriminatory income tax, computed by including a judge's official salary in gross income, is violative of Article III, Section 1. Concededly, our present position is contrary to *Evans* v. *Gore*. But

we believe the result there reached is founded upon an erroneous major premise, and therefore ask that the issue be here reexamined.

1. A NONDISCRIMINATORY TAX UPON NET INCOME IS NOT A REDUCTION OF COMPENSATION, NOR CAN IT POSSIBLY BE MADE THE MEANS TO EXERCISE INDIRECT CONTROL OVER THE JUDICIARY

At the very outset, it should be observed that the tax is not imposed upon a judge's salary as such. Section 22 (a) merely requires that it be included in *gross* income along with all other items of income from whatever source derived. From the aggregate of these items, there are subtracted the various deductions and credits applicable to the particular taxpayer, and only upon the *net* as thus determined is the tax computed. It is not a tax upon any particular item that goes to make up the total of gross income.

The tax is nondiscriminatory. It applies to all alike, regardless of the source of income. It is a general tax levied for the purpose of raising revenue to defray the expenses of government. "'Taxes are what we pay for civilized society * * *'." *N. Y. ex rel. Cohn* v. *Graves,* 300 U. S. 308, 313. "Taxation is but the means by which government distributes the burdens of its cost among those who enjoy its benefits." *Welch* v. *Henry,* 305 U. S. 134, 144.[1] And net income is employed as the meas-

[1] See also *Helvering* v. *Gerhardt,* 304 U. S. 405, 420; *Graves* v. *New York ex rel. O'Keefe,* decided by this Court on March 27, 1939.

ure of the tax, since it is believed to be a more equitable method of distributing that burden. Cf. *Stewart Dry Goods Co.* v. *Lewis*, 294 U. S. 550, 559–560; *Rapid Transit Corp.* v. *New York*, 303 U. S. 573, 582. In no sense can it be said that the tax is a charge against any of the sources that produced the gross income.

Plainly, the tax is therefore not a direct diminution of compensation within the meaning of Article III, Section 1. Only by treating it as an indirect encroachment, intended to achieve a forbidden end by devious means, can it be said that this tax violates the guarantee of undiminished compensation. But what was that end which the constitutional provision sought to achieve?

There is no veil of mystery surrounding the protection of a judge's salary against reduction. It was intended as a vital safeguard in the maintenance of an independent judiciary. It was calculated to prevent legislative coercion over the courts by forbidding pressure at a most delicate point. See 2 Story, Commentaries on the Constitution, Secs. 1628–1632; Miller, Constitution of the United States, pp. 340–343; Federalist, Nos. 78, 79; 1 Kent's Commentaries, *293, *294; 2 Tucker, Constitution of the United States (1899), Sec. 364; *O'Donoghue* v. *United States*, 289 U. S. 516, 531.

But a nondiscriminatory tax upon net income cannot possibly operate as an instrument of control over the judiciary. The only thing which the constitutional provision seeks to protect is in no

way endangered by such a tax. To say that Article III, Section 1, operates affirmatively to confer a special privilege upon the judiciary by exempting judges from the normal burdens of citizenship is to impart to those provisions a meaning that is justified neither by their plain language nor by their well-understood purpose.

In his dissenting opinion in *Evans* v. *Gore*, 253 U. S. 245, Mr. Justice Holmes said (p. 265):

> The exemption of salaries from diminution is intended to secure the independence of the judges, on the ground, as it was put by Hamilton in the Federalist, (No. 79,) that "a power over a man's subsistence amounts to a power over his will." That is a very good reason for preventing attempts to deal with a judge's salary as such, but seems to me *no reason for exonerating him from the ordinary duties of a citizen, which he shares with all others.* To require a man to pay the taxes that all other men have to pay cannot possibly be made an instrument to attack his independence as a judge. I see nothing in the purpose of this clause of the Constitution to indicate that the judges were to be a privileged class, free from bearing their share of the cost of the institutions upon which their well-being if not their life depends. [Italics supplied.]

Mr. Justice Holmes thus challenged the very foundation upon which the majority opinion proceeded. "That challenge persists and is without any satis-

factory answer" (*West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379, 395).

The fallacy of the majority opinion in *Evans* v. *Gore* lies in the assumption that if that tax were valid then any tax which singled out the judiciary at a discriminatory rate would likewise have to be sustained, thus achieving indirectly what Article III, Section 1, forbids. That assumption is, we submit, untenable. The validity of a nondiscriminatory tax does not carry with it the approval of a discriminatory exaction. It does not follow that the legislature could successfully enact a special tax directed solely at the judiciary, and thereby attain the forbidden end. Thus, in *Grosjean* v. *American Press Co.*, 297 U. S. 233, the Court struck down a discriminatory tax aimed at newspapers as a violation of the constitutional guarantee of a free press.[3] But the opinion was careful to point out (p. 250):

> It is not intended by anything we have said to suggest that the owners of newspapers are immune from any of the ordinary forms of taxation for support of the government.

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[3] The guarantee of a free press which specifically appears in the First Amendment was read into the Fourteenth Amendment by necessary implication as being a right of so fundamental a character as to be included within the due-process clause. *Grosjean* v. *American Press Co.*, *supra*, at p. 244.

Cf. *Associated Press* v. *National Labor Board*, 301 U. S. 103, 132–133. And over a long period of years, from 1819 through the present term of Court, the line of demarcation between general and discriminatory taxes has been sharply drawn, and often adverted to. See *McCulloch* v. *Maryland*, 4 Wheat. 316, 436–437; *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514, 524; *Miller* v. *Milwaukee*, 272 U. S. 713; *Nat'l Life Ins. Co.* v. *United States*, 277 U. S. 508; *Missouri* v. *Gehner*, 281 U. S. 313; *Willcuts* v. *Bunn*, 282 U. S. 216, 225, 226, 227, 229; *Denman* v. *Slayton*, 282 U. S. 514, 520; *Educational Films Corp.* v. *Ward*, 282 U. S. 379, 392; *Group No. 1 Oil Corp.* v. *Bass;* 283 U. S. 279, 282; *Pacific Co.* v. *Johnson*, 285 U. S. 480, 493, 494, 495, 496; *Fox Film Corp.* v. *Doyal*, 286 U. S. 123, 131; *Indian Territory Oil Co.* v. *Board*, 288 U. S. 325, 327; *Burnet* v. *A. T. Jergins Trust*, 288 U. S. 508, 514; *Schuylkill Trust Co.* v. *Penna.*, 296 U. S. 113, 120, 123; *Taber* v. *Indian Territory Co.*, 300 U. S. 1, 3, 4, 5; *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 149, 157; *Helvering* v. *Mountain Producers Corp.*, 303 U. S. 376, 385, 386, 387; *Helvering* v. *Gerhardt*, 304 U. S. 405, 413, 420; *Graves* v. *New York ex rel. O'Keefe*, decided by this Court on March 27, 1939.

The same fundamental error was the crux of Chief Justice Taney's famous letter to the Secretary of the Treasury protesting that judges were constitutionally exempt from liability under the

Civil War income tax legislation. He complained (157 U. S. 701):

> The act in question, as you interpret it, diminishes the compensation of every judge three per cent, and if it can be diminished to that extent by the name of a tax, it may in the same way be reduced from time to time at the pleasure of the legislature.

The Taney letter was heavily relied upon by Mr. Justice Van Devanter in writing the opinion for the majority in *Evans* v. *Gore*, at pp. 257–258. An opinion of Attorney General Hoar in 1869 had reached the same result (13 Op. A. G. 161),[1] which Mr. Justice Van Devanter also adverted to. A far more searching analysis of this question was made years later, however, by Attorney General Palmer, who recognized the difference between a general and a special tax. 31 Op. A. G. 475. He said (pp. 484, 487):

> It [the Constitution] precludes Congress from directly enacting that the salaries of these officials be reduced during their continuance in office. *I assume also that it would prevent the levying upon their salaries of a special tax not applicable to others en-*

[1] The Hoar opinion was technically based upon grounds of statutory construction: it construed the statute as inapplicable in view of the constitutional problem. Refunds were later made upon the basis of the Hoar opinion. See *Wayne* v. *United States*, 26 C. Cls. 274; Act of July 28, 1892, c. 311, 27 Stat. 282, 306.

> *joying like incomes.* But I cannot find in the Constitution anything from which there can fairly be inferred an intent to confer upon these officials, in addition to stability of income, exemption from any of the ordinary burdens or obligations of citizenship
>
> * * * * *
>
> The Revenue Act does not lay a tax on these incomes because of their source or in any discriminative way. The tax is laid on them just as it is laid on other income. The tax is not laid on the salaries as such. It does not necessarily apply to the whole of the salaries received. These salaries simply go, along with any other income the officials may have, to make up the gross income. From this, the same exemptions and deductions are allowed which are allowed to other taxpayers. And, as in the case of all other taxpayers, what is taxed is the amount of the gross income after making these allowances.

Although this opinion was quite obviously a more thorough examination of the issue than that of Attorney General Hoar, and although it dealt with the very legislation under attack in *Evans* v. *Gore,* Mr. Justice Van Devanter nevertheless relied upon the Hoar opinion without mentioning the other.

We respectfully insist that the Court fell into serious error in assuming that the tax could be employed as a device for indirect encroachment upon the judiciary. For, where the tax is nondiscriminatory, and particularly where it is only upon *net*

income, it seems clear that it cannot be identified with the source and treated as an instrument of control.

Thus, a specific constitutional provision prohibits the imposition of a "tax or duty" upon exports.[4] Nevertheless this Court has sustained the validity of a general tax upon net income, as applied to income derived in part at least from the business of exporting. *Peck & Co.* v. *Lowe*, 247 U. S. 165. The Court significantly declared (pp. 174–175):

> It [Revenue Act of 1913] is not laid on income from exportation because of its source or in a discriminative way, but just as it is laid on other income. The words of the act are "net income arising or accruing from all sources." There is *no discrimination*. At most, exportation is affected only indirectly and remotely. The tax is levied after exportation is completed, after all expenses are paid and losses adjusted, and after the recipient of the income is free to use it as he chooses. [Italics supplied.]

Similarly, it is settled that a state may tax net receipts from interstate commerce, even though the state could not otherwise interfere with such commerce. *U. S. Glue Co.* v. *Oak Creek*, 247 U. S. 321. What this Court said there is particularly

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[4] Constitution, Article I, Section 9.

appropriate as applied to the tax challenged here (p. 329):

> Such a tax, when imposed upon net incomes from whatever source arising, is but a method of distributing the cost of government, like a tax upon property, or upon franchises treated as property; and *if there be no discrimination* against interstate commerce, either in the admeasurement of the tax or in the means adopted for enforcing it, it constitutes one of the ordinary and general burdens of government, from which persons and corporations otherwise subject to the jurisdiction of the States are not exempted by the Federal Constitution because they happen to be engaged in commerce among the States. [Italics supplied.]

That result has been uniformly followed. *Shaffer* v. *Carter*, 252 U. S. 37, 57; *Atlantic Coast Line* v. *Daughton*, 262 U. S. 413, 416.

Moreover, a state tax, even upon *gross* receipts from interstate commerce, may be valid. See *Western Live Stock* v. *Bureau*, 303 U. S. 250; *Adams Mfg. Co.* v. *Storen*, 304 U. S. 307, 311. Cf. *Coverdale* v. *Pipe Line Co.*, 303 U. S. 604, 612–613. The tax is invalid only where it is such that the commerce might be subjected to the hazard of cumulative burdens from like taxes imposed by other states. *Gwin, White & Prince, Inc.* v. *Henneford*, decided by this Court January 3, 1939. Thus, the keynote of this line of cases is discrimination.

Again, a state has been permitted to apply a net income tax to income which includes interest on state bonds that had been issued as tax exempt. *Hale* v. *State Board*, 302 U. S. 95. The Court thus characterized the tax (p. 108):

> The tax is laid upon the net results of a bundle or aggregate of occupations and investments. * * * The returns from his occupation and investments are thrown into a pot, and after deducting payments for debts and expenses as well as other items, the amount of the net yield is the base on which his tax will be assessed.

Cf. *Flint* v. *Stone Tracy Co.*, 220 U. S. 107; *Pacific Co.* v. *Johnson*, 285 U. S. 480; *Adams Mfg. Co.* v. *Storen*, 304 U. S. 307, 314–316. From these cases, as well as from *N. Y. ex rel. Cohn* v. *Graves*, 300 U. S. 308,[6] it is plain that it is fallacious to treat the tax as impinging upon the source of the income. And a nondiscriminatory tax upon net income, being merely an equitable method of apportioning the cost of government among its beneficiaries, can hardly be regarded as an instrument of control with respect to the source.

However, shortly after *Evans* v. *Gore*, Mr. Justice Holmes appeared to bow to the will of the majority, and relied upon *Evans* v. *Gore* to invalidate a nondiscriminatory state income tax by reason of

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[6] See also *Guaranty Trust Co.* v. *Virginia*, 305 U. S. 19; *Maguire* v. *Trefry*, 253 U. S. 12.

the "exempt source." *Gillespie* v. *Oklahoma*, 257 U. S. 501, 505 (Justices Pitney, Brandeis, and Clark dissenting without opinion). The *Gillespie* case was thereafter followed in *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, over the vigorous protests of Justices Brandeis, Stone, Roberts, and Cardozo. Nevertheless, it was becoming increasingly clear that those decisions were unsound, and during the last term of Court, both the *Gillespie* and *Coronado* cases were specifically overruled. *Helvering* v. *Mountain Producers Corp.*, 303 U. S. 376, 387. We respectfully submit that *Evans* v. *Gore*, which played so important a role in the *Gillespie* decision, stands on no firmer ground. Moreover, the authority of *Evans* v. *Gore* has been further shaken by the recent overruling of *Collector* v. *Day*, 11 Wall. 113,* which had been prominently referred to in the *Gore* decision (p. 255).

2. THE COMPENSATION OF JUDGES IS SUBJECT TO TAX IN OTHER ENGLISH-SPEAKING COUNTRIES

(a) *Australia.*—The High Court of Australia construed Section 17 of the Queensland Constitution Act of 1867 as prohibiting "any reduction or diminution of the salary of a Judge during his Term of office." *Cooper* v. *Commissioner of Income Tax*, 4 Commw. L. R. 1304, 1315. Nevertheless, it found no obstacle in these provisions to the

* *Graves* v. *New York ex rel. O'Keefe*, decided by this Court on March 27, 1939.

application of an income tax to judicial compensation. Chief Justice Griffith declared (p. 1316):

> I think that the inclusion of a Judge's salary with the rest of his income in an aggregated fund, upon the balance of which, after specified deductions, an income tax is charged in common with the incomes of all other citizens of the State, is different in principle from a direct diminution of his salary *qua* salary. The power to make such a diminution might obviously be used to impair his independence by the suggestion that, if his decisions did not commend themselves to the legislature or the Executive Government, the power would be exercised or an attempt would be made to exercise it. The object of the provisions in the Constitution was clearly to prevent such an attack upon judicial independence.

The opinion of Justice Barton in that case is even more incisive. His analysis seems unanswerable[7] (pp. 1319–1320):

> The object of the section on its face is to secure the due payment of the salaries according to the terms on which they are allotted, and as long as the commissions of those entitled to them remain in force. That is what is said, and I think it is all that is meant. In this sense the notion of a reduc-

[7] Although the *Cooper* case had been decided prior to *Evans* v. *Gore*, it was not called to the Court's attention in the briefs of either party, nor was it adverted to by the Court.

tion (e. g., by Statute) is excluded, and, looking at the origin of the provision, and the clear object to be inferred from the words of the *Act of Settlement*, I have no doubt that the judicial independence was meant to be protected by that and subsequent legislation so far that even a sovereign Parliament would not dream of reducing a Judge's salary during his tenure of office. But the ordinary taxation of the State stands on a different footing. It is imposed on all who come within the area prescribed for taxation, whatever their rank or occupation. It is raised for revenue purposes, and one does not think of a Colonial Treasurer trying to levy a tax on the whole people, yielding many hundreds of thousands of pounds, for the mere purpose of vindictively obtaining a few pounds from one or half a dozen Judges. *To reduce the salaries of officiating Judges is, or may be, an attack on their independence—a punishment for its exercise. To subject them, in common with all their fellow citizens, to a general tax, is not likely to be anything of the kind, and it is not in reason to suppose that Parliament, in imposing it, has thought of it in that light.*[8] [Italics supplied.]

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[8] At the time of this decision (1907), the Australian courts were applying the American rule of reciprocal immunity holding that neither a state nor the central government could tax the salaries of officers of the other. *Deakin* v. *Webb*, 1 Commw. L. R. 585. Although *Webb* v. *Outrim*, [1907] A. C. 81, held to the contrary, the Australian courts then refused to follow it. See *Baxter* v. *Commissioners of Taxation*, 4 Commw. L. R. 1087. Accordingly, it is quite

(b) *South Africa.*—The same question was raised in the Supreme Court of South Africa with respect to Section 100 of the South Africa Act, which had taken over the identical clause from Article III, Section 1, of our Constitution ("which shall not be diminished during their continuance in office"): *Krause* v. *Commissioner for Inland Revenue*, So. Afr. L. R., App. Div. [1929], 286; 46 So. Afr. L. J. 374. The court specifically rejected the majority opinion in *Evans* v. *Gore* and relied rather upon Mr. Justice Holmes' dissent. Judge Stratford* said (pp. 294–296):

> But for a decision of the Supreme Court of the United States in *Evans* v. *Gore* (253 U. S. S. C. 244) I venture to think that the idea would not readily occur to any judge. The decision was given upon the meaning of Article III of the American Constitution which corresponds with secs. 100 and 101 of the South Africa. * * * The decision is of course very much *ad rem.* for the question before this Court is an identical one.

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significant that a different result was reached in the case of judges' salaries. See opinion of Higgins, J., in the *Cooper* case, p. 1830. Applying the reasoning of Mr. Justice Higgins the result here would follow *a fortiori* from *Graves* v. *New York ex rel. O'Keefe*, decided by this Court on March 27, 1939.

* Judge Curlewis concurred in Judge Stratford's opinion. Judge deVilliers delivered an opinion reaching a similar result. The opinion of Judge Wessel held the tax valid, but upon different grounds.

* * * In arriving at the meaning of the prohibition it is, of course, a sound principle of construction to have regard to the object the Legislature had in mind when imposing it. In the present case there is no doubt of the object in view, and it is the same as that of Article 100 [*sic*] of the American Constitution which is clearly stated in the majority judgment in *Evans* v. *Gore* * * *. But having thus alluded to the purpose of the prohibition, this important consideration is entirely disregarded, for it is not shown how the imposition of an income tax in any way impairs the independence of a judge. Whereas due consideration is given to this purpose in the dissenting judgment of Mr. Justice HOLMES * * *. It is indeed difficult to appreciate in what manner a judge's independence of action is attacked by having to contribute, with all other citizens of the Union, towards the maintenance of good order and government of the State in which he lives. The majority judgment, however, is solely based on the conclusion that income tax has the "effect" of diminishing the salary. Now this is only true in the sense that every compulsory expense diminishes a man's salary. And if ultimate effect is to be the test then a poll tax or a house tax would have that effect, so also a general rise in the cost of living due to the depreciation of currency. The salaries of the judges of Great Britain where [*sic*] very much lessened in buying value by the Government's action in departing from the gold standard.

By such departure their salaries were, in effect, diminished, and that too, was brought about by the action of the Government which paid them. But the judges suffered with the rest of the community and it would be fantastic to think that their independence was affected by the general financial policy of the Imperial Government. I can see no reason whatever for the conclusion, that by the prohibition the Legislature intended to exempt judges from bearing their share of the cost of governing the country. The prohibition is directed against the diminution of the salaries of judges as such, and cannot be construed to protect judges from the incidence of a tax of general applicability.

(c) *England and Canada.*—In England the independence of the judiciary was attained only after a long struggle. The abuses of the Stuart kings are well known. See Maitland, The Constitutional History of England (1908), p. 312. Although reforms were begun immediately after the Bloodless Revolution of 1688, it was not until 1700 that the independence of the judiciary was finally established on a legal basis. Act of Settlement (12 & 13 Will. III, c. 2), Sec. III. By the time of the adoption of our Constitution, the independence of the judiciary had become firmly rooted in the Anglo-American system of law, and is now among the most cherished traditions of both countries. Yet English judges are subject to the general income tax. See The Income Tax Act, 1918 (8 & 9

Geo. V, c. 40), First Schedule, Schedule E, Rule 6 (b):

> 6. The tax shall be paid in respect of all the public offices and employments of profit within the United Kingdom or by the officers hereinafter respectively described, namely—
>
> * * * * *
>
> (b) offices belonging to any court of justice in the United Kingdom, whether civil, criminal, ecclesiastical, naval, military, or air-force; * * *.

See Konstam, The Law of Income Tax (6th ed. 1935), p. 529. These provisions are not new, but relate back to the first of the modern income tax statutes introduced by Sir Robert Peel in 1842. See 5 & 6 Vict., c. 35, Sec. 146, Schedule E, Rule 3, and Sec. 187.

The English practice is further reflected in a Canadian case recently coming before the Judicial Committee of the Privy Council. *The Judges* v. *Attorney-General For Saskatchewan*, 53 T. L. R. 464. Sir Sidney Rowlatt, in sustaining the application of the Saskatchewan income tax to Canadian judges, failed to see how such a nondiscriminatory tax could come into collision with the maintenance of an independent judiciary (p. 466):

> Neither the independence nor any other attribute of the judiciary can be affected by a general income-tax which charges their official incomes on the same footing as the incomes of other citizens.

3. TAXABILITY OF STATE JUDGES UNDER STATE INCOME TAX LEGISLATION

The constitutions of many of our states contain comparable provisions forbidding the diminution of compensation. Although the cases construing those provisions have not been entirely in harmony with each other, they are nevertheless illuminating. On the whole, they tend to accept the views of Mr. Justice Holmes.

In Missouri, the compensation of judges is included in taxable income, notwithstanding Section 33, Article VI, of the state constitution, which prohibits reduction of compensation. *Taylor* v. *Gehner*, 329 Mo. 511 (1932). The Supreme Court of Missouri unambiguously declared (p. 515):

> Taxes are proportional contributions imposed by the State upon individuals for the support of government and for all public needs. * * *
>
> Nor can it be possible that said Section 33 was designed to relieve judges from the burdens of taxation. From its historical background the purpose intended to be subserved by the section is perfectly well known; it is one of the checks and restraints imposed to secure the independence of the judiciary. It is not a tax exemption provision. The thought finds lucid expression in the dissenting opinion of Mr. Justice HOLMES in *Evans* v. *Gore*, 253 U. S. 245, 265 * * *.

See 32 Col. L. Rev. 915.

In *Poorman* v. *State Board of Equalization*, 99 Mont. 543 (1935), the court sustained the Montana income tax as applied to the salary of a state judge whose compensation was protected against diminution by the Montana constitution. While the court pointed out several possible distinctions between that case and *Evans* v. *Gore*, it nevertheless rejected the result reached by the majority and spoke with high praise of Mr. Justice Holmes' dissent (pp. 558, 563):

> The writer of this opinion would not presume to attempt to improve upon Justice Holmes' demonstration that the majority opinion in the *Gore Case* is not in harmony with former pronouncements of that court,
>
> * * * * *
>
> * * * we have, after careful consideration, decided to follow rather the dissenting opinion and the opinions of the Wisconsin and Missouri courts.[10] This, we think, logic, reason and justice demand.

Again, the Court of Appeals of Kentucky upheld the imposition of the state income tax upon a judge's salary, in spite of a similar constitutional limitation. *Martin* v. *Wolfford*, 269 Ky. 411 (1937). Although the majority of the Kentucky court undertook to spell out a rather thin distinction between that case and *Evans* v. *Gore*, the dis-

[10] The Missouri case referred to was *Taylor* v. *Gehner*, discussed above, p. 28, and the Wisconsin case was *State et rel. Wickham* v. *Nygaard*, 159 Wis. 396, discussed *infra*, pp. 30–31.

senting justices quite plainly pointed out (p. 421) that the court was following the Holmes opinion. See 22 Minn. L. Rev. 106.

A like constitutional provision in Delaware protecting the salaries of all public officers against diminution was invoked by the Attorney General of Delaware seeking exemption from the state income tax. In sustaining the statute, the Supreme Court of Delaware at first attempted to distinguish *Evans* v. *Gore,* but then continued (*DuPont* v. *Green,* 195 Atl. 273, 276):

> If we be in error as to this then we express a preference for the dissenting views in *Evans* v. *Gore,* as delivered by Mr. Justice Holmes and concurred in by Justice Brandeis. Justice Holmes saw no attack on the independence of a Judge by requiring him to pay a tax that all other men had to pay, regardless of their rank or station. He saw nothing in the purpose of the clause of the Constitution "to indicate that judges were to be a privileged class, free from bearing their share of the cost of the institutions upon which their well-being, if not their life, depends."

Again, the Wisconsin income tax, as applied to a judge's salary, has been upheld. *State ex rel. Wickham* v. *Nygaard,* 159 Wis. 390 (1915). The court proceeded on the ground, however, that the constitutional provisions conferring general authority upon the state to impose a graduated income tax were to be read as superseding the earlier

specific constitutional provisions forbidding the diminution of compensation. But before it reached that conclusion the court expressed doubt as to whether the earlier provisions standing by themselves granted any immunity from taxation (p. 402):

> That the framers of our Constitution intended to exempt public officers from any part of the burden of taxation which might be imposed generally on the body of the taxpayers of the state for the support of the government and the benefit of the public including the office holders, may well be doubted.

The Minnesota constitution contains a provision forbidding the reduction of judges' salaries (Section 6, Article 6). Yet such judges are taxable with respect to their official compensation, and the Attorney General of Minnesota has ruled that the taxing statute does not run afoul of the state constitution. Minn. Atty. Gen. Rep. 1934, p. 1142. He refused to follow *Evans* v. *Gore,* stating (p. 1143):

> We cannot see that such a tax tends to destroy the independence of the judiciary when it but subjects their salaries to the same taxes which other public officials and other citizens are required to pay.

A similar guarantee of undiminished compensation appears in the New York constitution. Nevertheless the New York legislature has felt that a general income tax may be applied to judicial com-

pensation, and specifically so provided in an amendment to its tax law. Chapter 744 of the Laws of 1937. The amendment is preceded by a most extraordinary, as well as illuminating, declaration of policy, which reads as follows:

> SECTION 1. Declaration of policy. The taxes imposed by article sixteen of the tax law upon and with respect to personal incomes, being taxes for the support of the government of the state and its municipalities, and being measured by ability to pay, as evidenced by the amount of income received, are, in no just and proper sense, to be considered as a reduction in the salaries or compensation of public officials and judges, but, on the contrary, are for the purpose of establishing the amounts which public officials and judges, as well as other citizens, and those who derive benefits from government, should pay for the benefits so derived. In a certain sense, every tax, which a public official or judge is required to pay, diminishes his salary, but it is not believed that the people, when they adopted the constitution, contemplated that a tax which falls equally upon all citizens should be regarded as diminishing the compensation of public officials and judges. The legislature finds that the taxes imposed by article sixteen of the tax law in no sense discriminate against public officials and judges, but apply to them only to the extent that they apply to others having incomes and deriving benefits from the government of the state. It is hereby de-

> clared to be the policy of the state that salaries and compensation of public officials and judges shall be subject to personal income taxation under the laws of this state. Equality of burden is a corner stone of sound tax policy. Inequality results where the burden of taxation is unequally distributed.

And the Attorney General of New York has ruled that the tax is valid. Rep. Atty. Gen. New York, 1937, p. 198.

Contrary results, most of them distinguishable, have been reached in several states. Thus, the Supreme Court of Alabama in an advisory opinion thought that a special "occupation tax" upon state officials collectible at the source would be a reduction of compensation in violation of the state constitution. *In re Opinion of the Justices,* 225 Ala. 502 (1932). Similarly, the municipal tax declared invalid in *New Orelans* v. *Lea,* 14 La. Ann. 197 (1859), has been regarded as an exaction levied upon salary rather than upon net income. See *Poorman* v. *State Board of Equalization,* 99 Mont. 543, 557.

There are two early decisions in Pennsylvania, one in 1829 holding a judge's salary taxable (*Commissioners* v. *Chapman,* 2 Rawle 73), and the other in 1843 reaching the opposite conclusion (*Commonwealth* v. *Mann,* 5 Watts & Serg. 403). The *Mann* case, however, involved a direct tax upon salaries of public officers, and the tax was collected by being

withheld at the source. The court treated the tax as a *discriminatory*[11] exaction, saying (p. 417):

> The property of a judge, his income, whether derived from this or any other source, we admit is a proper subject of taxation. His security will then consist in being placed on the same footing with other citizens, and an abuse of them by any will be speedily corrected. Of this the relator does not complain; but he does complain that he, with others, is selected as a special object of taxation, contrary to the charter which he has solemnly sworn to support.

See *Poorman* v. *State Board of Equalization*, 99 Mont. 543, 562.

The only state in which we have found any published opinions squarely following the result of *Evans* v. *Gore* is North Carolina.[11a] *Long* v. *Watts*, 183 N. Car. 99 (1922); *Matter of the Taxation of the Salaries of Judges*, 131 N. Car. 692 (1902). But even in North Carolina, the legislature in 1933 enacted a new income tax law which was made applicable to the compensation of its judges taking office thereafter (May 13, 1933). N. Car. Pub. Laws, 1933, c. 445, Sec. 317. See also N. Car. Pub.

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[11] See also the opinion of the lower court in *Evans* v. *Gore*, 262 Fed. 550, 554 (W. D. Ky.). The opinion of the Supreme Court in *Evans* v. *Gore* undertakes to examine the Pennsylvania statute (note 1, pp. 256–257), presumably for the purpose of showing that the state tax was in fact non-discriminatory. The important consideration, however, is that the Pennsylvania court treated the tax as discriminatory, and its decision should be read in that light.

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In addition, the Court of Appeals of Maryland recently held a judge's salary immune from State taxation. Gordy v. Dennis, U.S. Law Week,

Laws, 1935, c. 371, Sec. 317; N. Car. Pub. Laws, 1937, c. 127, Sec. 317. And the Attorney General of North Carolina has ruled that these provisions are valid.[12]

The decision in *Evans* v. *Gore* has been much criticized by commentators and scholars,[13] as well as by the courts. The passing of more than eighteen years has served, if anything, to bring into more striking relief the cogency of Mr. Justice Holmes' dissent. It stands unanswered. The right to undiminished compensation should, of course, be accorded the fullest protection. But to enlarge that right to include relief from the ordinary obligations of citizenship would constitute a departure from sound principles of constitutional interpretation. And the perpetuation of the exemption from federal taxation conferred by *Evans*

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[12] See Biennial Report of the Attorney General of North Carolina, Vol. 24, 1936–1938, p. 151.

[13] See Clark, Further Limitations Upon Federal Income Taxation, 30 Yale L. J. 75; Corwin, Constitutional Tax Exemption, Supplement, 13 National Municipal Review 59; Corwin, Constitutional Law in 1919–1920, 14 Am. Pol. Sci. Rev. 635, 641–644; Powell, The Sixteenth Amendment and Income from State Securities, National Income Tax Magazine (July 1923), pp. 5–6; Powell, Constitutional Law in 1919–1920, 19 Mich. L. Rev. 118, 119; Lowndes, Taxing Income of Federal Judiciary, 19 Va. L. Rev. 153; Fellman, Diminution of Judicial Salaries (1938), 24 Iowa L. Rev. 89; Hall, 20 Ill. L. Rev. 376; 20 Col. L. Rev. 794; 43 Harv. L. Rev. 318; 45 L. Q. Rev. 291–292; 7 Va. L. Rev. 69, 72; 3 U. of Chi. L. Rev. 141. Cf. 18 Mich. L. Rev. 697–698; 1 N. Car. L. Rev. 39, 40; 32 Col. L. Rev. 915.

v. *Gore* would be particularly bizarre if the same judges enjoying that immunity were held to be subject to state taxation under the principles of *Graves* v. *New York ex rel. O'Keefe*, present Term. We respectfully submit that *Evans* v. *Gore* should be reexamined and overruled.

II

IN ANY EVENT, SINCE JUDGE WOODROUGH TOOK OFFICE AS CIRCUIT JUDGE AFTER JUNE 6, 1932, THE TAX DOES NOT OPERATE TO DIMINISH HIS COMPENSATION DURING HIS CONTINUANCE IN OFFICE

We have argued in Point I that a general nondiscriminatory tax upon net income computed by including judicial salary in gross income is not a diminution of compensation within the meaning of Article III, Section 1, and we urged the overruling of *Evans* v. *Gore* holding to the contrary. We now contend that even if *Evans* v. *Gore* be reaffirmed, the tax here challenged is not invalid.

Section 22 (a) of the Revenue Act of 1932, after requiring the inclusion of after-appointed judges' salaries in gross income, specifically declared that "all Acts fixing the compensation of such * * * judges are hereby amended accordingly." Thus, the provisions of law fixing $12,500 as the annual salary of Circuit Judges in the Eighth Circuit (Section 118 of the Judicial Code, as amended, U. S. C., Title 28, Sec. 213) were unambiguously limited by Section 22 (a) of the 1932 Act. The 1932 Act became law on June 6, 1932, and Judge Woodrough took office as a Circuit Judge there-

after, namely, on May 1, 1933. At the time he took office, the annual salary as fixed by Congress was $12,500, minus the tax imposed by law.

We respectfully submit that since the 1932 Act was in effect at the time Judge Woodrough took office, specifically limiting the provisions of law determining his judicial salary, there has been no "diminution" of compensation during his term of office. When he took office his "compensation" was fixed by law to be $12,500 minus the general income tax. He was put on notice that an income tax would be sought from him—a tax imposed upon all alike, one that Congress could not increase to exercise control over him without at the same time similarly increasing the tax burden upon all other taxpayers.

That the tax here challenged was imposed by the 1936 Act rather than the 1932 Act is immaterial. The succeeding income tax statutes, the Revenue Acts of 1934 and 1936, merely incorporated the provisions of Section 22 (a) of the 1932 Act. In the aggregate, the successive revenue Acts form a continuous fabric of tax legislation.[14] Thus, the 1936 Act here involved simply reenacts, so far as pertinent, the provisions of Section 22 (a) of the 1932 and 1934 Acts.

[14] Cf. *Milliken* v. *United States*, 283 U. S. 15, 23-24; *Favous Machine Co.* v. *United States*, 282 U. S. 375, 378-379; *Bear Lake Irrigation Co.* v. *Garland*, 164 U. S. 1; *Commissioner* v. *Emery*, 62 F. (2d) 591, 592 (C. C. A. 7th), affirmed (*Griswold* v. *Helvering*), 290 U. S. 56.

Moreover, the legislative scheme of the successive revenue acts does not involve the repeal of an existing statute when it is superseded by a later act. Thus, when the 1934 Act was enacted, there was no repeal of the 1932 Act, but Section 63 of the 1934 Act simply provided:

> SEC. 63. TAXES IN LIEU OF TAXES UNDER 1932 ACT.
>
> The taxes imposed by this title shall be *in lieu of* the corresponding taxes imposed by the Revenue Act of 1932. [Italics supplied.]

And similarly, when the 1936 Act supplanted the 1934 Act, Section 63 of the 1936 Act provided:

> SEC. 63. TAXES IN LIEU OF TAXES UNDER 1934 ACT.
>
> The taxes imposed by this title and Title IA shall be *in lieu of* the taxes imposed by Titles I and IA of the Revenue Act of 1934, as amended. [Italics supplied.]

Thus, Section 22 (a) of the 1932 Act was never repealed. It remains as a specific limitation upon the statutory provisions fixing judicial salaries. And since the taxes imposed by the 1934 and 1936 Acts are merely "in lieu" of like taxes imposed by the predecessor statute, there is an implied repeal only to the extent that liability under the later act differs from liability under the earlier.[15]

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[15] The practice of enacting a new revenue act which imposed taxes merely "in lieu" of those under existing legislation began with the Revenue Act of 1928, c. 852, 45 Stat.

Furthermore, if it should be held that the taxes imposed upon Judge Woodrough by the 1934 and 1936 Acts are invalid, then he continues to be liable under the 1932 Act. For, since the taxes imposed by the 1934 and 1936 Acts are merely "in lieu" of those imposed by the 1932 Act, Congress presumably intended liability under the 1932 Act to continue unless the successor provisions were constitutional and operative. If the taxes imposed by the subsequent legislation be invalid, then the later acts never took effect to that extent, and there were no taxes imposed by them that could be collected "in lieu" of the corresponding taxes in the 1932 Act. Accordingly, the 1932 Act would remain in force, and Judge Woodrough would continue to be liable thereunder.[16]

Finally Judge Woodrough has no standing to urge that his compensation has been decreased through an increase in tax in the 1936 Act, because the plain fact is that *his* tax has not been increased. While the *quantum* of tax due under the 1934 and 1936 Acts is somewhat different than under the

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791. See Section 63 of the Revenue Act of 1928. Prior thereto, it was customary actually to repeal the earlier statute. See Section 1200 (a) of the Revenue Act of 1926.

[16] Compare the cases holding that an unconstitutional amendment to a preexisting valid law may be treated as separable, leaving the basic statute in effect as though no amendment had been attempted. *Truax* v. *Corrigan*, 257 U. S. 312, 341–342; *Frost* v. *Corporation Commission*, 278 U. S. 515, 525–527; *Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. 28, 47. See also Field, Effect of an Unconstitutional Statute (1935), pp. 283–284.

1932 Act, the amount of liability has been *decreased* rather than increased. Where the amount of earned income is $26,000, or less, the tax due under the 1934 and 1936 Acts is less than the corresponding tax under the 1932 Act." It is only where the income reaches brackets somewhat in excess of $26,000 that the rates under the 1934 and 1936 Acts produce an increased tax.

Thus, after allowing the $2,500 personal credit available to married persons, the tax on $12,500 earned income under the 1932 Act is $735, whereas the corresponding tax under the 1934 and 1936 Acts is $650. Accordingly, even if, under *Evans* v. *Gore*, the income tax be regarded as a direct charge against salary, then here the net amount receivable by Judge Woodrough in 1936 was greater than in 1933 when he took office. There has been no diminution of compensation during his continuance in office. He took office at a time when the tax on $12,500 was $735, and at a time when the statutory

[17] Although the surtax rates in the 1934 and 1936 Acts were higher than in the 1932 Act there were two other factors that more than counter-balanced those rates in the lower brackets. First, the *normal* rate was made more advantageous to taxpayers in the 1934 and 1936 Acts; it was fixed at 4%, whereas under the 1932 Act it was 4% of the first $4,000 in excess of credits and 8% of the remainder. Section 11 of the 1932, 1934, and 1936 Acts. Second, the 1934 and 1936 Acts for the first time introduced the earned income credit, which was fixed at 10% of earned income up to $14,000. Section 25 (a) (4) and (5) of the 1934 Act and Section 25 (a) (3) and (4) of the 1936 Act.

provisions fixing salary were specifically limited by Section 22 (a) of the 1932 Act. The tax which he now challenges as invalid is less. If anything, there has been, as to him, an *increase* in compensation.

Miles v. *Graham*, 268 U. S. 501, does not require a contrary result. There, a judge challenged the applicability of the Revenue Act of 1918 to his salary even though he had been appointed after its enactment. It was the very statute that had been declared invalid in *Evans* v. *Gore* as to a prior-appointed judge, and to apply it to an after-appointed judge would have required the Court to rewrite the Act. No such segregation was made in the Act, nor was there any provision that made the tax a limitation upon the salary provisions themselves. In the instant case, the statute by its terms applies only to after-appointed judges, and "the compensation fixed by law when [Judge Woodrough] assumed his official duties" (*Miles* v. *Graham*, *supra*, at p. 509) was $12,500 minus the general income tax. Moreover, *Miles* v. *Graham* cannot be regarded as binding authority since the taxpayer therein was a judge of the Court of Claims and therefore not entitled to the protection of Article III, Section 1. *Williams* v. *United States*, 289 U. S. 553; *Ex parte Bakelite Corp'n*, 279 U. S. 438, 455.

Nor is it relevant that prior to his taking office in 1933 and prior to June 6, 1932, Judge Woodrough was a Judge of the United States District Court.

There is no continuity between the two judgeships. In assuming his new duties Judge Woodrough entered into an entirely new office, established by different statutory provisions (Sec. 118 of the Judicial Code, as amended, U. S. C., Title 28, Sec. 213). He became a Circuit Judge only upon appointment by the President and approval of the Senate (Cong. Record, Vol. 77, Part 2, 73d Cong., 1st Sess., p. 1571). There can be no basis for the contention that Judge Woodrough's prior term of office as District Judge prevents the taxability of the compensation from his present office.

Moreover, even if the two offices be considered as one for purposes of Article III, Section 1, then nevertheless there has been no diminution. For his salary as District Judge was $10,000, whereas, even after applying the tax to his $12,500 salary as Circuit Judge, his net receipts have increased rather than decreased.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted.

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